

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALLAN BLOCK CORPORATION,

Plaintiff,

v.

COUNTY MATERIALS CORPORATION,

Defendant.

OPINION AND ORDER

06-cv-476-bbc

Plaintiff prevailed at trial in this breach of contract action in which it contended that defendant sold concrete blocks in violation of the parties' licensing agreement. The Court of Appeals for the Seventh Circuit affirmed the jury's finding of liability and remanded for the limited issue of determining damages for improper sales of defendant's Keystone and County Cub lines of concrete block. On November 28, 2008, I entered summary judgment in favor of defendant, finding that plaintiff had failed as a matter of law to produce evidence that could sustain a determination of damages for the sale of either type of block and that plaintiff was not entitled to relief under Rule 56(f). Plaintiff now moves to alter or amend the judgment pursuant to Rule 59(e) only as it concerns the dismissal of the damages claim based on County Cub block sales, contending that the court misunderstood its position and

that it can prove the amount of its damages. I find no reason to alter or amend the judgment.

OPINION

In order to prevail at trial on its County Cub block damage claim, plaintiff was required to prove in a reasonable, non-speculative way, the damages it sustained as a result of sales of County Cub blocks in violation of the parties' non-compete agreement. Plaintiff proposed to do this by proving the number of County Cub blocks sold in violation of the agreement, multiplied by a reasonable royalty rate. (dkt # 299 at 13). As plaintiff correctly noted: "County breached the Non-Competes by selling County Cub blocks *in the Territory*" included in the covenant not to compete. (Id.) The critical issue on summary judgment was whether plaintiff adduced sufficient facts to prove how many blocks were sold in the territory during the relevant period so that a reasonable royalty calculation could be performed.

Plaintiff manifestly did not do so. Instead, it offered vague testimony that sales in the protected territory "were substantially below our projections" (dkt #299 at 14) and that if defendant had not wrongfully competed, plaintiff's sales "would have been significantly higher." (Id.). In lieu of attempting to prove, or even estimate the number of blocks sold in violation of the non-compete agreement, plaintiff sought relief under Rule 56(f). Now that I have denied the request for relief under Rule 56(f), plaintiff asserts that it has sufficient

evidence of improper County Cub sales volume to prove its damage case.

To obtain relief under Rule 59(e), plaintiff must demonstrate either a manifest error of law or fact in the prior judgment or newly discovered evidence. FDIC v. Meyer, 781 F.2d 1260, 1268 (7th Cir.1986). Plaintiff has presented no significant new evidence in support of the motion to alter or amend that it could not have presented in opposition to the original summary judgment motion and it does not suggest otherwise. Rather, it contends that I committed manifest error in granting summary judgment because plaintiff was, and is in a position to prove the total number of County Cub blocks sold by defendant. It is true that plaintiff has evidence of the total number of County Cub blocks sold as expressly noted in the opinion and order granting summary judgment: “On December 2, 2006, plaintiff served the report of its damage expert, Arthur Cobb, which included total sales figures for County Cub blocks, but did not identify sales by date and location.” Dkt #315 at 3.

Plaintiff continues to offer only evidence of defendant’s total sales of County Cub blocks without any attempt to prove what portion of those sales were in the restricted territory. That evidence would have been inadequate to defeat summary judgment had it been timely presented. It remains inadequate. Plaintiff is entitled to recover damages of a reasonable royalty only for blocks defendant sold in the geographically restricted area. Plaintiff has offered no evidence that would allow a jury to determine or even estimate what those sales were. Consequently, it has not presented sufficient evidence to permit a

reasonable jury to decide in its favor on a damage amount for the wrongful sale of County Cub blocks.

ORDER

IT IS ORDERED that plaintiff Allan Block Corporation's motion to alter or amend the judgment dismissing its claim for damages from the sale of County Cub blocks is DENIED.

Entered this 10th day of March, 2009.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge